

TEMPS & CO., INC., *et al.*, :  
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 Plaintiffs, :  
 :  
 v. : Civil Action No. 00-1349 (JR)  
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 FINOVA MEZZANINE CAPITAL, INC., :  
 *et al.*, :  
 :  
 Defendants. :

This memorandum sets forth the reasons for an earlier order of this Court granting the motion of Alan J. Smith to dismiss the claim of Finova Mezzanine Capital, Inc., that he tortiously interfered with a contract between Finova and Temps & Co., Inc.

Finova loaned \$3,000,000 to Temps in May 1997. As part of the consideration for that loan, Temps executed a Stock Purchase Warrant entitling Finova to purchase 53 shares of Temps common stock at \$1.00 per share. All the stock of Temps was held by Steven Ettridge. When Ettridge died in October 1999, Temps repaid the Finova loan with the proceeds of a key man life insurance policy. Finova and Temps executed a Release and Termination Agreement that required Finova to mark the promissory note "cancelled" and return it to Temps. As Finova complied with that requirement, it also mistakenly marked the Warrant "cancelled" and returned it to Temps. Some months later, in

June 2000, Finova advised Temps of its intent to exercise the Warrant. Smith, as representative of the Estate of Steven Ettridge, prevailed upon Temps to refuse to honor the Warrant.<sup>1</sup> Temps and Smith then filed this suit, seeking a declaration that the Warrant has been cancelled and is unexercisable, or, in the alternative, that Temps is now the "holder" of the Warrant. Finova counterclaimed against Smith, alleging that he tortiously interfered with its exercise of the Warrant.

Smith's motion to dismiss argues that he is protected from liability for tortious interference by a financial interest privilege that is recognized under District of Columbia law. Finova disagrees, presenting arguments under Tennessee law. Since both Tennessee and District of Columbia law appear to recognize a financial interest privilege, see Church of Scientology Int'l v. Eli Lilly & Co., 848 F. Supp. 1018 (D.D.C. 1994); Kirk v. Purkey, 1985 Tenn. App. Lexis 3231 (Oct. 29, 1985), and since the elements of that privilege appear to be the same in both jurisdictions, no choice of law question is presented. See Cellular Radio Corp. v. OKI America, Inc., 664 A.2d 357, 359 n.2 (D.C. 1995).

A person with a financial interest may safely interfere with a contract if "his purpose is to protect his own interests and if he does not employ improper means." 86 C.J.S. Torts § 44; see also Restatement (Second) of Torts §§ 767, 769 (1977); Phil

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<sup>1</sup> The facts asserted by Finova are taken as true for purposes of this motion to dismiss.

Crowley Steel Corp. v. Sharon Steel Corp., 702 F.2d 719, 722 (8th Cir. 1983) (recognizing privilege under Missouri law); Record Club of America, Inc. v. United Artists Records, Inc., 611 F. Supp. 211, 217 (S.D.N.Y. 1985) (recognizing privilege under New York law); Heavener, Ogier Services, Inc. v. R.W. Florida Region, Inc., 418 So.2d 1074, 1076-77 (Fla. Dist. Ct. App. 1982) (recognizing privilege under Florida law).

Smith's financial interest is clear: if Temps had honored Finova's attempt to exercise the Warrant, the sale of stock to Finova would have affected the status of Temps as an "S Corporation," with the result that Ettridge's estate would incur an additional tax liability in excess of \$2 million. See Counterclaim ¶ 20; see also Deauville Corp. v. Federated Department Stores, 756 F.2d 1183, 1196 (5th Cir. 1985) ("Stock ownership generally constitutes a superior financial interest that will trigger the privilege.").

Finova does not dispute the existence of the financial interest but argues that it does not confer the privilege in this case because Smith attempted "to take undue advantage of Finova's mistaken return of the Warrant ... which the Estate knew or had reason to know was a mistake." Def.'s Opp. at 10. "To aid in determining whether an alleged tortfeasor's contractual interference is improper or whether it is legally justified, the District of Columbia [] looks to the Restatement of Torts." Curaflex Health Services, Inc. v. Bruni, 899 F. Supp. 689, 695

n.7 (D.D.C. 1995). The Restatement identifies a number of factors a court should consider in evaluating whether conduct is legally justified, including the nature of the actor's conduct and motive; the interests of those interfered with; the interests sought to be advanced by the actor and the social interests involved; the proximity or remoteness of the actor's conduct to the interference; and the relations between the parties.

Restatements (Second) of Torts § 767. When a party asserts a financial interest privilege, those factors form the question "whether the person's conduct is motivated by a desire to protect his economic interest, or whether it is motivated by spite, malice, or some other improper objective." Bendix Corp. v. Adams, 610 P.2d 24, 31 (Alaska 1980); see also Pure, Ltd. v. Shasta Beverages, Inc., 691 F. Supp. 1274, 1280 (D. Hawai'i 1988); cf. Sorrells v. Garfinckel's, Brooks Bros., Miller & Rhoads, Inc., 565 A.2d 285, 290 (D.C. 1989) ("The Restatement's reference to 'improper' conduct is simply another way of saying that [to avoid liability,] the alleged tortfeasor's conduct must be legally justified.").

Even if Smith knew that Finova acted mistakenly in returning the Warrant, it was not unlawful for him to try to use that mistake to avoid a tax assessment against an estate to which he owed a fiduciary responsibility. Smith is thus entitled to the financial interest privilege. See John R. Loftus, Inc. v. White, 150 A.D.2d 857, 860 (N.Y. App. Div. 1989) (Where a party

"does not demonstrate any factual basis for its allegations of malice, other than suspicion[,] [a] conclusory allegation of malice is [] insufficient to support such cause of action."). The privilege protects Smith from the claim of punitive damages as well, of course.

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JAMES ROBERTSON  
United States District Judge

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